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EXAMINER

FOSTER, JIMMY G

ART UNIT	PAPER NUMBER
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3728

DATE MAILED: 04/18/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/035,204

Applicant(s)

DE LAFORCADE, VINCENT

Examiner

Jimmy G Foster

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-66 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5, 7, 8, 10-13, 15-21, 23-40, 42, 43, 45-49 and 53-66 is/are rejected.
- 7) ☒ Claim(s) 6, 9, 14, 22, 41, 44 and 50-52 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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1) The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2) Claims 1, 3, 7, 12, 13, 18, 20, 23, 24 and 30-32 are rejected under 35 U.S.C. § 102(b) as being anticipated by Baudin (6,068,396). In the reference of Baudin, there is provided a first container 27 and a second container 2,14. The first container includes a neck at 32, an opening defined by the neck at free edge 31, a coupling member 32 and a safety member defined by projection 36. The second container includes an opening defined by skirt 18, a coupling member at 25, and a seal member at 20,21,37. In addition there is provided a removable stopper 33 for closing the first opening. The stopper is connected to the neck of the first container by interengaging screw threads.

In the Figure 2, the projection/protrusion 36 extends up to a level on line with the free edge of the container. Therefore, the projection/protrusion 36 may be said to extend through the opening of the first container 27.

The safety member 36 may be considered to be blunt ended since it does not end at a single edge. When the coupling members 25,32 of the containers are fully telescoped with respect to each other, the projection 36 will become abutted with portion 37 of the seal, and sufficient force created by the configuration between the projection and the seal will cause the seal to

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become opened. However, it is asserted by the examiner that at some position in the partially telescoping of the coupling members, the projection will press against the element 37 of the seal, but there will be insufficient force therebetween to opening the seal.

The container 27 is asserted to be a tub since the side walls thereof are made of polyethylene, which is flexible, and since the walls are cylindrical.

3) The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4) Claims 1-5, 7, 8, 10-13, 15-17, 21, 25-40, 42, 43, 45-49, 53-66 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Spielman (3,941,270) in view of Goncalves (5,209,565). In the reference of Spielman, there is provided a second container at 46 for containing a product. The reference of Spielman also discloses a second container/reservoir at column 1, lines 26-32.

The second container 46 includes a second opening at 12, a seal at 32,38,40,42, a neck/coupler at 11, a removable stopper at screw closure 20. The seal comprises a film seal since the disc 38 may be only 0.0005 inches in thickness.

In addition, there is provided a protrusion 48. Also, there is provided a first opening (unnumbered, but see Figures 2 and 3) that is

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defined by the upper mouth opening of a threaded interior surface/hollow shaft of a tubular element/neck which is held/bonded by the nut 54 and gasket 56 to a support surface/cylinder 52 (see also Figure 1). The protrusion 48 is shown extending through said first opening to a location slightly above said first opening (as best seen in Fig. 2). The protrusion includes a rounded/blunt end. The protrusion and said first opening are intended engage with the container 46 (in the second position) for the purpose of opening the container 46 so as to allow gravity flow of the product from the container (as indicated in Fig. 3) into the reservoir/first container.

The examiner contends that the shoulder of the coupler 11 of the first container 46 will become coupled to the threaded tubular element, as shown in Figure 3 since the term coupling is broad enough to not require any interlock.

Although the protrusion 48 is intended to remove the seal on the container 46 with sufficient force, the examiner asserts that the protrusion is inherently capable of pressing against the seal without opening the seal if a lesser force is used. Accordingly, the protrusion may be reasonably said to be a safety member. Moreover, as evident from Figure 2, the protrusion is inherently capable performing this non-opening pressing engagement while the coupling elements (i.e. the shoulder of container 46 and the surface it will contact) are separated (in the protected relative positions of the containers).

Regarding, the limitation in claim 8 which calls for a cutting device/cutting device, the term "cutting" is broad enough to have the meaning "intersecting." Moreover, the cutting device is not required to be a separate structure from the safety member, as evidenced in Applicant's claim 10. Therefore, the protrusion 48 may be considered to include a cutting

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element since protrusion 48 will intersect the disc 32 of the seal of container 46, as shown in Figure 3.

Although the reference of Spielman does not disclose the reservoir/first container (col. 1, line 31 or 32) as being structurally connected in some manner with the structure defining the first opening (described above) and with the protrusion 48, the reference of Goncalves, especially at Figure 2, suggests that a first container (3) may be made structurally associated with a device for opening a second container (2) to allow dispensing of a product (oxidation dye past) from the second container into the first container without the product being able to escape the combination of the containers. It is readily apparent from the figure that this would avoid undesirable spillage. Accordingly, it would have been obvious in view of Goncalves to have made the first opening (described above) of Spielman and the protrusion 48 of Spielman structurally connected with the reservoir of column 1, line 31 or 32 (Spielman) to allow dispensing of the product of the second container from the second container into the first container without the product being able to escape the combination of the containers.

Additionally, the reference of Goncalves (again Figure 2) further suggests that a first container may include an additional product (such as an oxidizing paste) for being mixed or combined with the product in a second container when the product in the second container is moved to the first container. Accordingly, it would have further been obvious in view of Goncalves to have provided a first product in the reservoir disclosed by Spielman (as modified above) to be mixed or combined with the product (second product) of the second container 46 when the product in the second container is transferred to the first container.

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In addition, the reference of Goncalves further suggests that mixable products to be combined in a mixing container assembly may constitute reactant components of a hair care product such as a hair dye, wherein one component is a dye paste and the other component is an oxidizer (see col. 1, lines 7-36), for the purpose creating a hair dye for changing the color of hair. Accordingly, it would have been obvious in view of Goncalves to have provided an oxidizer as a first product in the first container of Spielman (as modified above) and to have provided a oxidation paste as a second product in the first container 46 of Spielman for creating a hair dye for the purpose of dying hair.

In addition, the reference of Goncalves at 8,21 suggests that the coupling members between containers coupled for transferring a product from one container to another may be provided with screw threads (8,21,) for the purpose of interlocking the coupling members, such as by relative rotation of one with respect to the other. Accordingly, it would have been obvious in view of Goncalves to have made the coupling members (as described above) of Spielman with screw threads.

In addition, the reference of Goncalves at, column 4, lines 28-40, suggests that a second container (2) may be in the form of a flexible tube (4) for forcing product from the second container to the first container. Accordingly, it would have further been obvious in view of Goncalves to have made the second container 46 as a flexible tube, for the purpose of forcing the product from the second container into the first container reservoir (as modified above).

The material aluminum is known for making tubes, such as in toothpaste tubes, glue tubes etc., for the purpose of making the tube structure collapsible. In addition, it is known to make tube seals of aluminum to

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making the seals puncturable. Moreover, selection of a known material based upon its suitability for the intended use thereof generally will not support patentability. In re Leshin, 125 USPQ 416. Accordingly, it would have further been obvious in view of these reasons, to have made the tube and seal of the second container of aluminum.

5) Claim 6, 9, 14, 19, 22, 41, 44 and 50-52 are objected to as being dependent on a rejected claim, but would be allowable if amended to include all of the limitations of the base claim and any intervening claim.

6) Applicant's arguments filed January 19, 2005 have been fully considered but they are not deemed to be persuasive. Applicant has argued that the Baudin reference does not explicitly or inherently disclose a safety member configured to press against a seal while the seal maintains closure of a second opening. Applicant (remarks, page 5) supports this argument by further arguing that the stem 37 of Baudin is not a seal as is stopper 21, and that the projection element 36 (which is described in the rejection as a safety member) therefore does not press against a seal.

However, the rejection identifies the combination of elements 20,21,37 as defining the seal in Baudin, and this is not inappropriate since the seal includes the opening 20 and includes the element 21,37 (which is one piece) for sealing the opening. Inasmuch stem 37 is one piece with the stopper 21, it is not unreasonable to consider the stem (37) as being a part of the seal. Accordingly, the statement in the rejection that the safety member 36 (which is a projection) will press against the seal is accurate. Accordingly, Applicant's arguments are unpersuasive.

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It is noted that Applicant does not appear argue the accuracy of the examiner's assertion that at some position in partially telescoping the coupling members (25,32) of Baudin, the projection 36 will press against the element 37, but there will be insufficient force therebetween to opening the seal.

Applicant has argued that the reference of Spielman does not disclose a system for mixing two products, as recited in claim 1. However inasmuch as the first container of Spielman is capable of holding an additional product and inasmuch as Applicant's claim 1 does not disclose the two products in a structural manner in the claim, this argument is unpersuasive, as relying on intended use of the reference. As to the other claims of Applicant in which the content is structure or is part of an active method step, the reference of Goncalves teaches using a two bottle system for the purpose of mixing two products, which teaching would suggest desirability of using a two-container system of the type in which a product is transferred from one container to another, for mixing the product with another product in the receiving container.

Applicant has argued that there is no motivation to provide the teaching of Goncalves to the Spielman reference since the Spielman reference fails to provide the motivation for making the combination, because Spielman is only concerned with a seal. To support this, Applicant has further argued that someone skilled in Spielman's art would not have looked to Goncalves, which relates to mixing of two products. The examiner is not persuaded by this argument since the motivation for modifying a primary reference need not come from the primary reference itself, but may come from a secondary reference. See In re Laskowski, 10 USPQ2d 1397 (Fed Cir. 1989). In this

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case, the motivation/suggestion may come from Goncalves. The reference Goncalves by its very purpose suggests a desirability of using a two-container system to include one product in one container and another product in the other container for transferring one of the products to the other product. The motivation from the entire disclosure of the reference is that of achieving a mixture from the two products. Inasmuch as Spielman discloses a two-container system, the teaching of Goncalves is pertinent to the subject matter of Spielman for the purpose identified by Goncalves. Moreover, the step of transferring one product to the container having the other product is suggested by Goncalves for providing a mixture of two products.

Applicant has argued that the examiner's interpretation of the term "coupler", as being something that provides contact without interlock, is an unreasonable interpretation. However, inasmuch as the term "coupler" is defined as anything joining/uniting two things together, this argument is unpersuasive since the shoulder of the portion 11 of the container 46 of Spielman will into contact with the opening of the other container (see Fig. 3), and therefore the two containers will become joined/united by the contact.

7) **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. § 1.136(a).

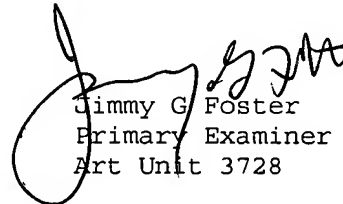
A SHORTENED STATUTORY PERIOD FOR RESPONSE TO THIS FINAL ACTION IS SET TO EXPIRE THREE MONTHS FROM THE DATE OF THIS ACTION. IN THE EVENT A FIRST RESPONSE IS FILED WITHIN TWO MONTHS OF THE MAILING DATE OF THIS FINAL ACTION AND THE ADVISORY ACTION IS NOT MAILED UNTIL AFTER THE END OF THE THREE-MONTH SHORTENED STATUTORY PERIOD, THEN THE SHORTENED STATUTORY PERIOD WILL EXPIRE ON THE DATE THE ADVISORY ACTION IS MAILED, AND ANY EXTENSION FEE PURSUANT TO 37 C.F.R. § 1.136(a) WILL BE CALCULATED FROM THE MAILING DATE OF THE ADVISORY ACTION. IN NO EVENT WILL THE STATUTORY PERIOD FOR RESPONSE EXPIRE LATER THAN SIX MONTHS FROM THE DATE OF THIS FINAL ACTION.

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8) Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jimmy G Foster whose telephone number is (571) 272-4554. The examiner can normally be reached on Mon-Fri, 8:45 am - 5:15 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on (571) 272-4562. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.



Jimmy G Foster
Primary Examiner
Art Unit 3728

JGF
15 April 2005